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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

NATHAN GEORGE DINITZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (App. A, *infra*, pp. 1a-25a) is reported at 492 F. 2d 53. The *per curiam* opinion of the court of appeals *en banc* (App. B, *infra*, pp. 26a-28a) is reported at

504 F. 2d 854. The opinion of the district court (App. D, *infra*, pp. 31a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals *en banc* (App. C, *infra*, pp. 29a-30a) was entered on November 27, 1974. By order of December 23, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including January 26, 1975 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who has moved for and been granted a mistrial may prevent renewed prosecution on the ground that an unintentional error committed by the court at trial rendered his motion involuntary and that the court's granting of his motion did not satisfy the manifest necessity test.

2. Whether a court's declaration of a mistrial, manifestly necessary when made, may nevertheless bar renewed prosecution because the error creating the need for the mistrial was not itself manifestly necessary.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

STATEMENT

1. In an indictment returned on December 6, 1972, in the United States District Court for the Northern District of Florida, respondent Nathan George Dinitz was charged with having conspired to distribute a Schedule I controlled substance (LSD), in violation of 21 U.S.C. 846, and with having distributed such substance, in violation of 21 U.S.C. 841(a)(1). Respondent initially retained Jeffrey Meldon to represent him. Meldon appeared with respondent at the arraignment and subsequently filed several pretrial motions. Approximately five days before trial, respondent retained Maurice Wagner as his trial counsel, although Meldon continued to do "investigation into the case" (Tr. 98).[1] Wagner had not been admitted to practice before the United States District Court for the Northern District of Florida, but on the day of trial the court allowed him to appear *pro haec vice* on respondent's behalf. Meldon was also present as counsel of record at trial, as was Fletcher Baldwin, a professor of law at the University of Florida. Wagner advised the court at the beginning of trial that Baldwin would "make the arguments with regard to the law and I [Wagner] will try the facts * * *" (Tr. 45).

After the jury had been sworn and the government had made its opening statement, Wagner began his

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[1] Transcript references ("Tr.") are to the transcript of the proceedings held in the United States District Court for the Northern District of Florida on February 15-16, 1973, which ended in a mistrial.

opening statement for respondent. Since the government's case on both counts depended largely upon the testimony of undercover agent Steve Cox concerning the circumstances of his purchase of LSD from respondent, Wagner's trial strategy was to attack Cox's credibility. Wagner attempted to implement this strategy by suggesting at the outset of the trial that respondent had been "set up" by the sale to Cox for a subsequent extortion attempt. Wagner apparently hoped that the jury would infer from this suggestion either that Cox was the extortionist or that he had played some part in the extortion scheme (Tr. 105-106).[2]

After introducing himself and his co-counsel to the jury, Wagner initiated the following challenge to Cox's credibility (Tr. 72):

> Mr. Wagner: * * * After working on this case over a period of time it appeared to me that if we would have given nomenclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it The Case—

[2] Approximately one week after his arrest, respondent had reported to the Federal Bureau of Investigation that he had received a telephone call from someone offering to arrange for all charges arising from the sale to Cox to be dropped if respondent would pay the caller a sum of money. With the Bureau's cooperation, an envelope was filled with paper and placed at the appointed pick-up spot. A man was observed picking up the envelope, but the Bureau was unable to apprehend him—although it was able to confirm that the man bore no resemblance to Cox (Tr. 106). No evidence linking Cox to the attempted extortion was ever developed.

> Mr. Reed [Asst. U.S. Attorney]: Your Honor, we object to personal opinions.
>
> The Court: Objection sustained. The purpose of the opening statement is to summarize the facts [that] the evidence will show [and] state the issues, not to give personal opinions.
>
> Mr. Wagner: Thank you, Your Honor. I call this the Case of the Incredible Witness.

The government again objected. The court sustained the objection, had the jury removed and admonished Wagner (Tr. 72-74).[3]

At a later point in his opening statement, Wagner renewed his attack on Cox. The court again had the jury removed and warned Wagner a second time (Tr. 76-77). After the jury had returned, Wagner began to recite what the evidence would show up to the time of respondent's indictment and arrest. He quickly returned to the suggestion that Cox had been involved in an attempted extortion, however, stating that "[s]ome week or ten days later Nat [Dinitz] began to get telephone calls offering—" (Tr. 87). At the government's request, the jury was once more removed and the court pressed Wagner for evidence of some connection between the extortion attempt and Cox. When Wagner was unable to offer any such evidence, the trial judge ordered him to leave the courtroom (Tr. 87-95).

After Wagner had left the courtroom and Meldon had disclaimed any responsibility for the substance

[3] Wagner had also annoyed the court at the pretrial suppression hearing by unduly prolonging his argument in support of a motion to suppress that the court considered "obviously frivolous" (Tr. 74).

of Wagner's opening remarks (Tr. 95-98), the judge asked Meldon whether he was prepared to assume the lead in trying the case. Meldon responded that he was not, since he had not discussed the case with any of the witnesses or otherwise prepared for trial. He further stated that he was reluctant to proceed in the face of respondent's desire to have the case tried by Wagner. The judge thereupon recessed the trial until the following morning, instructed Meldon to prepare himself to proceed at that time, and indicated that he would consider the entire matter overnight (Tr. 98-101).

In chambers the following morning, Meldon again stated that respondent did not want him to try the case and that he felt that he "would not be able to give [respondent] a fair trial because my trial strategy and trial tactics would be completely different from those made in the opening remarks * * *" (Tr. 103). The judge reviewed the events of the preceding day and noted that an unusually large number of persons, including members of the news media, had appeared for the trial and that he was concerned that the interest of many of those persons was attributable to a local news story to the effect that when the case was tried "there was going to be a shocking matter that the public would hear of." The judge stated that he could only assume that the "matter" referred to in the local media was the alleged extortion attempt directed at respondent (Tr. 107).

The judge also set forth some of the alternatives available to respondent and to the court (Tr. 105) and stated that because of Wagner's misconduct and the inferences the jury might draw from Wagner's absence from the trial, he was "seriously considering granting a mistrial * * *" (Tr. 107). The judge requested that counsel for respondent consider the available alternatives with respondent and advise the court of respondent's wishes. He also suggested that the government consider the advisability of consenting to the declaration of a mistrial and of retrial at a later date "when there is a possibility that this widespread publicity would not permeate the atmosphere" (Tr. 108).

Following a short recess, Meldon moved for the declaration of a mistrial on respondent's behalf. Respondent's position was explained to the court as follows (Tr. 109):

> Mr. Meldon: Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest.

The government did not oppose respondent's motion, and the court announced (Tr. 110):

> Then I am going to declare a mistrial, gentlemen. I think that under all of the circumstances in this case that it would be in the interest of justice to declare a mistrial and that is what I plan to do.

Prior to his second trial, respondent moved to dismiss the indictment on the ground of double jeopardy and, alternatively, to have Wagner permitted to reenter the case. Both motions were denied by the trial court (App. D, *infra*, pp. 31a-37a). Respondent, a third-year law student, proceeded at his second trial *pro se* and was convicted on both counts contained in the indictment.

2. A divided panel of the court of appeals reversed respondent's conviction (App. A, *infra*, pp. 1a-25a). After granting the government's motion for rehearing *en banc*, the full court affirmed the panel's decision in a brief *per curiam* opinion, seven judges dissenting (App. B, *infra*, pp. 26a-28a).

According to the two judges who comprised the majority of the panel, respondent's claim that his retrial was barred by the Double Jeopardy Clause involved two relatively distinct issues: first, the "threshold" issue whether respondent's motion for a mistrial was voluntarily made; and, second, if it was not voluntarily made, whether the court's declaration of a mistrial was justified by "manifest necessity." With respect to the first issue, the panel held that the actions of the trial judge in banishing Wagner and threatening to take disciplinary action against Meldon (Tr. 95-98), coupled with Meldon's lack of preparation and respondent's refusal to be represented by him, gave respondent "no choice but to move for or accept a mistrial. Under the circumstances of this case * * * [respondent] can hardly be said to have relinquished voluntarily his right to

proceed before the first jury" (App. A, *infra*, pp. 13a-14a).[*]

Turning to the second issue, the panel pointed out (*id.* at 12a):

> Usually, the declaration of a mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result, the appellate court normally tests to determine whether the precipitating event created the requisite manifest necessity to abort the trial.

On the "unique facts" of this case, however, the panel declined to focus its inquiry on the circumstances that existed when the mistrial was declared. Instead, because the "die was cast with the trial judge's response to the conduct of defense counsel," the panel held that appellate review was appropriately focused on Wagner's expulsion rather than on the subsequent declaration of a mistrial (*ibid.*). The panel then con-

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[*] In support of this holding, the panel quoted from *United States* v. *Walden*, 448 F. 2d 925 (C.A. 4). In *Walden*, the Fourth Circuit panel had held that the consent of several of the defendants to the declaration of a mistrial had in effect been coerced by the trial judge and that termination of the trial by the judge on his own motion had not been justified by manifest necessity. Prior to the *en banc* decision in the present case, however, the panel's decision in *Walden* was superseded by an order of the Fourth Circuit *en banc* (458 F. 2d 36), affirming by an evenly-divided court the decision of the district court that manifest necessity for the mistrial had existed. The full court in *Walden* did not reach, therefore, the issue of consent. Petitions for writs of certiorari were denied *sub nom. Cook* v. *United States*, 410 U.S. 969 and *sub nom. Ard, et al.* v. *United States*, 409 U.S. 867, respectively.

cluded that means of dealing with Wagner's misconduct short of excluding him from the trial had been available to the trial judge and that these alternatives should have been, but were not, considered. Thus, in the view of the majority of the panel, the action of the trial judge in excluding Wagner—when measured by the "manifest necessity" test—constituted an abuse of judicial discretion and barred renewed prosecution of respondent.

The dissenting member of the panel assumed for purposes of argument that the trial judge had erred in excluding respondent's counsel. But he rejected as mistaken in light of decisions of this Court and, in any event, as "too extreme to be workable," the majority's view that that "error" and the trial judge's granting of respondent's motion for a mistrial operated to bar respondent's subsequent trial (App. A, *infra*, p. 24a). The test mandated by the decisions of this Court, in the judgment of the dissenting member, was whether the expulsion of Wagner constituted judicial overreaching—not whether it was an abuse of discretion.[5] And just as the majority had expressly declined to "characterize the trial judge's actions as judicial overreaching" (*id.* at 13a), so the dissenting member found no evidence of judicial impropriety (*id.* at 23a). The dissent concluded that, by presenting trial judges with the

[5] This Court has stated that such overreaching would exist "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal * * *." *United States* v. *Jorn*, 400 U.S. 470, 485 n. 12.

specter of the bar of double jeopardy for errors not attributable to overreaching, the panel's decision would "give rise to much reluctance in granting mistrials" (*id.* at 24a).

REASONS FOR GRANTING THE WRIT

This case presents questions concerning the law of double jeopardy that are of great importance to the administration of criminal justice. In affirming the panel's decision in this case, the majority of the court of appeals *en banc* held (App. B, *infra*, p. 26a):

> [A] defendant's motion for mistrial does not remove the bar to reprosecution when the formal mistrial motion by defendant is solely caused by an abuse of judicial discretion, which though not intended to avoid an acquittal, is so damaging to the defendant that he cannot proceed with his case and submit it to the jury then empaneled.

The court thus departed from the "judicial overreaching" standard applied by this Court when a mistrial flows from a defense motion (see *United States* v. *Jorn*, 400 U.S. 470, 485) and substituted in its stead the "manifest necessity" standard applied when the trial court acts *sua sponte* (see *Illinois* v. *Somerville*, 410 U.S. 458). We submit that this departure is without a predicate in decisions of this Court or support in public policy—particularly in a case such as the present, in which neither the judicial "error" complained of nor any other action by the court may properly be said to have "coerced" respondent into moving for a mistrial.

In addition to employing an incorrect standard in measuring the propriety of the mistrial declared pursuant to respondent's motion, the decision below gravely distorts the standard evolved by this Court for assaying the propriety of a mistrial declared by the trial court on its own motion. *E.g.*, *Illinois* v. *Somerville*, *supra*. The court of appeals applied the test of "manifest necessity" not to the *effects* of trial error, irrespective of its source, but to the *cause* of such error. It is difficult to conceive of a test more destructive of " 'the public's interest in fair trials designed to end in just judgments' " (410 U.S. at 470; quoting from *Wade* v. *Hunter*, 336 U.S. 684, 688-689) than a test which thus focuses on the avoidability of errors committed at trial rather than on the alternatives available to the trial judge at the time the declaration of a mistrial is being considered.

While the court of appeals sought to limit its holding to the "extraordinary circumstances" of this case (App. B, *infra*, p. 27a), we are convinced that the instant circumstances are far from "extraordinary" and that the court's holding will spawn confusion and unwarranted results in a great number of future cases. We further believe that the inevitable effect of the majority decisions in this case is seriously to impair the utility of a procedural device—the mistrial—designed as much "for the more effective protection of the criminal accused," *Gori* v. *United States*, 367 U.S. 364, 370, as for the benefit of society. Rather than be told by an appellate court that an error on its part—made "in the immediate exigencies of

trial" (*ibid.*)—precludes retrial, many trial judges faced with this decision can be expected to adopt the safer course of routinely denying defense motions for a mistrial even in the wake of clear error precluding a fair consummation of the trial.

1. In *United States* v. *Jorn*, 400 U.S. 470, 485, this Court stated that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." As noted earlier, the majority of the panel and of the full court found that the mistrial in this case was made necessary by judicial error—not by judicial overreaching. That the trial judge ultimately chose to grant respondent's motion for a mistrial as the least drastic remedy for that "error" was entirely proper under *Jorn*. Respondent, like any defendant aggrieved by the occurrence of error during trial, faced a concededly difficult choice between the risk of conviction and affirmance on appeal and the relinquishment of the right to have his case determined by the jury then impaneled.[6] In making that choice he was assisted by two retained attorneys. The decision

[6] In the circumstances of this case, in which the first witness had yet to be called, respondent was as a practical matter relinquishing very little of value. The trial to that point was going neither well nor badly, and the next jury was as likely to be favorably disposed toward his defense as the one then impaneled.

reached was involuntary only in the sense that he could not be certain that the trial judge (or an appellate court) would agree subsequently that the trial had been infected with reversible error. Consequently, if he felt he had been prejudiced by the court's action he may have been well advised to move for a mistrial. Respondent exercised, therefore, not a "Hobson's choice" (App. A, *infra*, p. 13a) but the right to move to abort his original trial in the face of perceived prejudice.

2. But even assuming that the trial court's action compelled respondent's motion for a mistrial and was tantamount to a *sua sponte* declaration of a mistrial by the court, respondent's retrial would still be permissible under the teaching of *Illinois* v. *Somerville*, *supra*. The majority of the court of appeals, sitting *en banc*, held that the effect of the trial court's action in excluding Wagner was to deprive respondent "of effective assistance of counsel[,] thereby making further conduct of the trial impossible" (App. B, *infra*, p. 27a). We perceive no substantive distinction, so far as the policies subsumed in the Double Jeopardy Clause are concerned, between an error that is "so damaging to the defendant" that he concludes that "he cannot proceed with his case" (*id.* at 26a) and an unintentional error that carries with it the certainty of reversal on appeal. In either case, continuation of the trial, while physically possible, would be a futile and wasteful course of action. And in either case, therefore, the law empowers the trial

judge—irrespective of the source of the error—to abort the trial on his own motion. Thus, even applying the reasoning of the majority opinions below, what this Court said in *Somerville* has equal application here (410 U.S. at 464):

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

Accordingly, in ruling that respondent's reprosecution was barred by double jeopardy, the court of appeals sanctioned a fundamental departure from this Court's decision in *Somerville*. See also *Simmons* v. *United States*, 142 U.S. 148; *United States* v. *Perez*, 9 Wheat. 579.

3. The effect of the court of appeals' decision in this case is to erase any meaningful distinction in the law of double jeopardy between unintentional and intentional errors occurring at trial insofar as those errors are not directly chargeable to the defendant and figure significantly in the defendant's decision to move for a mistrial. Underlying the elimination of this distinction is the premise that trial judges and prosecutors may, without an unduly adverse impact upon the administration of criminal justice, be held to standards of flawless conduct that might be expected of someone acting with the benefit of hindsight. The fallacy of this premise is amply demonstrated by the facts of this case.

As pointed out in Judge Bell's dissenting opinion, there is strong support in the record for the trial judge's conclusion that respondent's trial counsel was bent upon a conscious course of baiting the court with the intent to trigger a mistrial (App. A, *infra*, p. 23a). Within a period of only a few minutes, the trial judge was compelled to excuse the jury three times in order to admonish counsel. Despite repeated warnings, however, respondent's counsel persisted in the very conduct for which he had been admonished. Most significantly, he continued to attempt to imply in the jury's presence—without any evidentiary support whatever—that the principal prosecution witness had been involved somehow in an extortion attempt directed at respondent.[7]

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[7] In explaining the considerations that had motivated him to grant respondent's motion for a mistrial, the trial judge noted in his Order of March 26, 1973 (App. D, *infra*, p. 33a):

> a) The demeanor of counsel Wagner and the impression he conveyed to the jury made it impossible for the government to get a fair trial: Counsel Wagner stated to the jury that the arrest of the defendant was but an "afterthought" by the government when counsel knew that the defendant had been indicted for a substantial period of time prior to the arrest. Then characterizing his next line of remarks as "the unusual circumstances" surrounding the prosecution of defendant, counsel Wagner placed before the jury information regarding certain telephone calls which the defendant had received, Wagner then intending to tell the jury of an extortion attempt against defendant which he [Wagner] was prepared to argue to the jury involved the government agent * * *.

It should also be noted that, in commenting upon the trial judge's decision to exclude respondent's trial counsel, at least

Even if it is conceded for purposes of argument that the trial judge's decision to exclude respondent's trial counsel was error, however, the decision of the court of appeals would place yet a further burden on trial judges—that is, the burden of correctly anticipating the response of defendants to action by the court. In this case, when the trial judge removed respondent's trial counsel he had no reason to believe (a) that Meldon, who had represented respondent vigorously from the beginning and had remained co-counsel of record, was unprepared to assume the lead in conducting the defense or (b) that respondent would refuse to be represented at trial by Meldon. It was only after respondent's trial counsel had left the courtroom that the court became aware of these problems.

It may be argued that the high price from the public's standpoint placed by the decision below upon errors occurring at trial not chargeable to the defendant will encourage trial judges (and prosecutors) to proceed more circumspectly before acting in ways that make declaration of a mistrial "inevitable." We submit that that is a highly improbable proposition. The more likely result, it seems, is that noted in the dissenting opinion below (App. A, *infra*, p. 24a):

> The trial courts will understand that society will be better served by completing a trial, even after clear error has arisen and the defendant seeks

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one of respondent's other attorneys concluded "[a]fter a full night's research * * * that the Court's action was proper * * *" (Tr. 104).

the mistrial, than the alternative of a mistrial and the possible bar of double jeopardy based on the error. The time and expense involved in completing the trial, taking an appeal, and in the retrial will often be a small price to pay to protect the societal interest in law enforcement.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2109.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NATHAN GEORGE DINITZ, DEFENDANT-APPELLANT

April 4, 1974

Appeal from the United States District Court for the Northern District of Florida.

Before BELL, DYER and CLARK, Circuit Judges.

CLARK, Circuit Judge:

I.

Nathan George Dinitz was convicted of violating 21 U.S.C. § 846 by conspiring to distribute a schedule I controlled substance (LSD) and of violating 21 U.S.C. § 841(a)(1) by distributing LSD. Dinitz's first trial ended in a mistrial. He contends that retrying him violated his fifth amendment rights against double jeopardy. Because we agree that the retrial constituted double jeopardy, we do not reach any of the other arguments Dinitz advances.

Like almost all mistrial-double jeopardy cases this one turns on the facts of its particular procedural context. Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). Dinitz was charged

with participating in a sale of LSD to Steve Cox, a government informer. He initially employed Attorney Jeffrey Meldon to represent him. Meldon appeared with him at arraignment and filed numerous pretrial motions. Approximately five days before Dinitz's trial, Attorney Maurice Wagner was hired to act as lead counsel and conduct the trial. Wagner had not been admitted to practice before the Northern District of Florida, but the court allowed him to appear *pro haec vice* in Dinitz's case. Meldon was also present at trial along with a professor of law from the University of Florida,[1] as counsel for Dinitz. After the jury had been sworn and the government had made its opening statement, Wagner began an opening statement in behalf of Dinitz. The crux of the government's case on both counts was to be the testimony of agent Cox as to the circumstances of his purchase from Dinitz. Wagner's trial strategy was to attack the credibility of Cox, and a part of this strategy was to put before the jury at the outset the idea that Dinitz had been "set up" with the sale to Cox as a predicate for a subsequent extortion attempt. Wagner intended to offer proof that a week after his arrest Dinitz had received a phone call from someone who offered to arrange for all charges to be dropped if Dinitz would pay over a certain amount of money. Obviously Wagner hoped the jury

[1] The professor, Fletcher Baldwin, advised the court at the outset of the proceedings that he was not a trial attorney and would not actually participate in Dinitz's trial. He did brief and argue the instant appeal.

would infer from this evidence either that Cox was the extortionist or that he had some part in the scheme. Ample proof of the attempt at extortion was known to be available to the defense but, as it subsequently developed, no connection between Cox and the extortion attempt could ever be demonstrated.[2] In the early part of his opening statement, Wagner started an attack obviously aimed at Cox.

> Mr. Wagner: After working on this case over a period of time it appeared to me that if we would have given nonmenclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it the case—
>
> Mr. Reed: Your honor, we object to personal opinions. (Asst. U.S. Attorney)
>
> The Court: Objection sustained. The purpose of the opening statement is to summarize the facts [that] the evidence will show [and] state the issues, not to give personal opinions.
>
> Mr. Wagner: Thank you, your honor. I call this the case of the incredible witness.

The jury, then, was removed from the courtroom and the court warned Wagner in the following terms:

[2] Dinitz had promptly reported the extortion attempt to the Federal Bureau of Investigation and, at the suggestion of the FBI, an envelope was filled with paper and placed underneath a large trash container at the supposed pick-up spot. Johnson, an FBI agent, in an attempt to catch the extortionist kept the trash container under surveillance and reported that he saw someone pick up the envelope but was unable to apprehend the pick-up man. However, Johnson was able to describe the physical appearance of the man picking up the envelope and the subject did not in any way resemble Cox.

> The Court: You appeared at this trial late, you showed up, you were not counsel of record, you have never filed an appearance. This court was not aware of your participation until the jury was to be selected. I do not approve of your behavior and if you attempt to bait this court once again I am going to refuse to allow you to practice law in this court again.

Wagner then continued with his opening statement, bringing his chronological recitation of what the evidence would show up to the time of the indictment. At that point he began this statement: "some week or ten days later Nat [Dinitz] began to get telephone calls offering—." The government's objection again caused the jury to be removed from the courtroom. In the jury's absence the court asked Wagner what he was about to discuss. He responded that he was going to discuss the extortion attempt against Dinitz. The court demanded that he demonstrate that he had proof that Cox was the man who picked up the parcel at the trash container. When it became apparent that the defense had no such proof, the following exchange transpired (still in the absence of the jury):

> The Court: You will leave this courtroom immediately and you will never practice law in this court again, Mr. Wagner. I direct you to leave now. Mr. Marshal, see that he leaves the building immediately. . . . [Wagner departs]. This is the worst exhibition I have ever heard of since I have sat on the bench. It is plain character assassination, and I hope Mr. Meldon that you are not responsible for any part of it. I will ask you now if you are. Did you discuss with Mr. Wagner what his opening statement was going to consist of and the evidence that he was going to attempt to put before this jury with respect to those phone calls and extortion attempts?
>
> Mr. Meldon: Your honor, I did not prepare the opening statement, and Mr. Wagner prepared his opening statement independently.
>
> The Court: This is the worst exhibition I have seen. I am going to inquire of you further as to your knowledge of what Mr. Wagner was attempting to do. Mr. Wagner knew without doubt that this was inadmissible, highly prejudicial and nothing but character assassination, and I am going to inquire of you further, and if I find that you had anything to do with it I am going to take further action in your regard, too.

After the Assistant U. S. Attorney interjected that Meldon might well have been aware in advance of Wagner's intended trial tactics, the court continued to address Meldon as follows:

> The Court: All right, convince me, Mr. Meldon, that you had no control over Mr. Wagner. You were the lead counsel in this case. Apparently, you called him in to be associated with you. Explain to me that you had no control over his activities and had no knowledge that he was planning to present this case in this manner.

Meldon thereupon denied ever telling Wagner that Cox was the extortionist and disclaimed any responsibility for Wagner's planned opening statement. The court then inquired of Meldon if he was prepared to

proceed at that time, whereupon the following exchanges occurred:

> Mr. Meldon: The Defendant had stated to me that since I was not hired to argue the case he is in a quandary because he hired Mr. Wagner to argue the case and he feels he needs more time to obtain outside counsel to argue the case for him.
>
> The Court: That comes too late. You are his counsel and have been. I will consider it between now and 9:00 o'clock tomorrow morning.
>
> * * * *
>
> Mr. Meldon: I need additional time to prepare in that I have not discussed it with the witnesses and Mr. Wagner has done all of the preparation.
>
> The Court: It is your responsibility to contact your witnesses and discuss this case with them between now and 9:00 o'clock tomorrow morning, because that is when we will continue.

At 9:00 the following morning in chambers Meldon again advised the court that Dinitz did not want him to try the case and, that in any event he was unprepared to take the lead in the trial at that time. The judge advised counsel that he did not think that the government or the defendant could get a fair trial and stated that he was seriously considering granting a mistrial. He then declared a thirty minute recess and requested counsel for both sides to consider the alternatives. After the recess, the transcript shows this colloquy:

> Mr. Meldon: Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest.
>
> The Court: What does the Government have to say?
>
> Mr. Crongeyer: Your Honor, we have discussed this at some length and we think that for the reasons you have set forth already on the record a mistrial might be appropriate in this case, and the Government would not oppose a mistrial.
>
> The Court: Then I am going to declare a mistrial, gentlemen. I think under all of the circumstances in this case that it would be in the interest of justice to declare a mistrial and that is what I plan to do.

Subsequently, the court granted Meldon leave to withdraw as Dinitz's counsel. Prior to his second trial, Dinitz moved to dismiss the indictment on the basis of double jeopardy and alternatively to have Wagner reinstated as his trial counsel, but both motions were denied. At his second trial Dinitz represented himself and was convicted on both counts in the indictment.

II.

United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 1965 (1824) is the customary starting point for determining whether retrial following a preverdict discharge of the first jury violates the de-

fendant's fifth amendment rights against double jeopardy.[3] In Perez, a murder case, the trial judge acting sua sponte granted a mistrial after the jury was unable to agree on a verdict. The Supreme Court per Mr. Justice Story, in the course of holding that the fifth amendment's double jeopardy clause did not prohibit retrial stated, "[w]e think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." This rule represents a balancing on the one hand of a criminal defendant's valued right to complete his trial before a particular jury, United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); and on the other, society's interest in fair trials and preventing "the guilty from going free", Smith v. Mississippi, 478 F.2d 88 (5th Cir. 1973). Inspired by language in Perez, subsequent cases have consistently applied this test on a case by case basis and refused to catalogue specifically the circumstances in which the declaration

[3] The fifth amendment's double jeopardy "prohibition is not against being twice punished, but against being twice put in jeopardy," United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). Thus, jeopardy can attach before a trial is completed and the Supreme Court has held that in a jury trial jeopardy attaches when the jury is impaneled and sworn. *See, e.g.*, Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963).

of a mistrial would be supported by "manifest necessity" or the "ends of public justice."[4]

Last year in Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973) the Court distilled from previous cases a "general approach" to mistrial-double jeopardy cases premised on the "public justice" policy of *Perez*. *See also* Smith v. Mississippi, *supra*, and McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973). One line of cases holds that a mistrial is proper "if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." Another supplementary line of cases forbids the granting of a mistrial on the basis of any ruling or procedure which would lend itself to prosecutorial manipulation. *See*, Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); McNeal v. Hollowell, *supra*; and United States v. Cheung, 485 F.2d 689 (5th Cir. 1973).

Notwithstanding the requirements of *Perez* for mistrials granted sua sponte or at the prosecution's behest, "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." United States v. Jorn, *supra*, 400 U.S. at 485, 91 S.Ct. at 547, 557, 27 L.

[4] For examples of cases see note, Twice in Jeopardy, 75 Yale L.J. 262 (1965).

Ed.2d at 543 (1971). Thus, even if manifest necessity for a mistrial is lacking, in the absence of prosecutorial or judicial overreaching, a defendant's motion for or consent to a mistrial normally removes any double jeopardy barrier to reprosecution. United States v. Iacovetti, 466 F.2d 1147 (5th Cir. 1972), cert. denied, 410 U.S. 908, 93 S.Ct. 963, 35 L.Ed.2d 270 (1972); United States v. Beasley, 479 F.2d 1124 (5th Cir. 1973); and United States v. Romano, 482 F.2d 1183 (5th Cir. 1973) [1973]. However, the mere fact of consent does not have such talismanic qualities that "mere mouthing of the motion (mistrial motion) in open court constitutes in every case waiver of a subsequent plea in bar." United States v. Walden, 448 F.2d 925 (4th Cir. 1971).

III.

The instant case is an unusual one indeed, and its unique facts must be placed in proper perspective before these legal principles can be applied. After Wagner's banishment and the court's explicit threats to deal severely with Meldon if he had ever been aware of Wagner's proposed opening statement, the court was faced with three possible courses of action: (1) it could have proceeded with trial; (2) it could have granted a continuance and reconvened with the same jury at a later date;[5] (3) or it could have declared a mistrial.

[5] The continuance would have had the effect of a mistrial if the same jury was not reconvened, since jeopardy attaches when the jury is sworn, see footnote 3, supra.

Proceeding with the trial would have been so altogether unreasonable as to carry the probability of a reversal on appeal. *See Somerville, supra.* The court's expulsion of Wagner left Dinitz without the counsel he had employed to lead the conduct of his defense. The threats to Meldon placed the only remaining trial attorney in the inconsistent position of having to protect his own standing as a member of the bar of the Northern District of Florida against any suggestion of complicity with the line of defense Wagner had begun and of acting as a vigorous and effective advocate on behalf of Dinitz. Additionally, Meldon had not prepared himself to try the case, and, after Wagner's dismissal, Dinitz made it clear that he did not want Meldon to represent him.[6]

The second course, a continuance of sufficient length to permit the employment of new counsel was also unreasonable and would likewise have failed *Somerville's* "general approach." There would have been a very real probability of prejudice inherent in releasing the jurors to go about their normal affairs in contact with the general public and news media for such a period of time. Sequestering them would have been out of the question. Additionally, the break in the continuity of the trial would poorly serve juror's memories. Most importantly, however, a continuance would saddle Dinitz with the unfavorable inferences the jurors would surely draw from the

[6] Dinitz, a third year law student at the time, was similarly unprepared to represent himself.

delay itself and from Wagner's absence at the rescheduled trial.

Usually, the declaration of a mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result, the appellate court normally tests to determine whether the precipitating event created the requisite manifest necessity to abort the trial. The instant case does not fit this mold. The actions of the court in banishing Wagner and threatening Meldon inexorably led the trial down the path to mistrial. As the government forcefully argues manifest necessity was present when the mistrial was finally granted, but we would be wrong to focus the inquiry there.[7] The die was cast with the trial judge's response to the conduct of defense counsel.

Before testing the validity of this response, we must resolve the threshold issue of whether Dinitz's consent to the mistrial operated to bar his subsequent double jeopardy plea.[8] If it did not so operate, we

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[7] The government argues and the trial judge indicated that there might have been other grounds for granting the mistrial at the time it was granted. The case had been highly publicized, and it had been reported to the court before trial that some of the jurors had overhead a comment potentially prejudicial to Dinitz by a security guard. However, the court was aware of these reasons long before Wagner was excluded and if it thought them sufficient to warrant granting of a mistrial, it would have acted earlier.

[8] We do not reach Dinitz's argument that Meldon's position of divided loyalty between representing his client and protecting his own interests operated to require a personal consent from Dinitz to the mistrial. *Cf.* Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942).

must then determine whether what the trial judge did at the time of Wagner's disbarment met the manifest necessity requirements of *Perez* and *Somerville*.

IV.

When Dinitz consented to a mistrial did he bar himself from raising the double jeopardy issue? In answering this question we need not characterize the trial judge's actions as judicial overreaching which under *Jorn, supra*, would allow Dinitz to plead double jeopardy notwithstanding consent on his part. Using a defendant's consent to a mistrial to bar his subsequent complaint of double jeopardy implies that he has bound himself to accept an abandonment of the first trial by exercising something more substantial than a Hobson's choice. If a defendant is able to continue the trial even though harmed by prosecutorial or judicial error, but desires to abort that proceeding, he has waived his right to proceed before the jury first selected. In the instant case, however, the actions of the trial judge had the effect of rendering Dinitz unable to conduct his defense. With Wagner excluded and Meldon disabled, Dinitz had no choice but to move for or accept a mistrial. Under the circumstances of this case, see United States v. Walden, *supra*, he can hardly be said to have relin-

quished voluntarily his right to proceed before the first jury.[9]

V.

Since the court's actions at the time of Wagner's banishment made the subsequent grant of a mistrial inevitable, appellate review must center on these actions rather than on the resulting declaration. Dismissal of an attorney in the midst of a criminal trial is not per se wrong. The discretion reposed in the trial court to see that the proceedings before it accord justice to the litigants is, in the abstract, broad enough to encompass such a removal. For example if defense counsel by his actions so prejudices the jury trying his client that manifest necessity exists to declare a mistrial, he may be expelled and a mistrial declared. The fact that the mistrial may be attributed to the absence of counsel is of no moment. Despite such formal characterization, the ultimate cause of the mistrial remains the counsel-provoked jury prejudice. Additionally, it is possible that an attorney's conduct can be so disruptive of the orderly processes of justice as to require his removal from the proceedings and an ensuing mistrial. Again, the manifest necessity for declaring a mis-

[9] Judge Bell incorrectly premises his dissenting remarks upon the supposition that we have either misread or misunderstood *Jorn*. As his analysis of the law of that holding shows, that is not the source of our difference. Rather, it is purely due to fact analysis. For emphasis, we reiterate that this record discloses to us that the trial judge's response to the conduct of defense counsel deprived Dinitz's motion for a mistrial of its necessary consensual character.

trial would be found in the state of affairs created by counsel before the court takes action. Here our scrutiny must first be directed to the impact on the jury of Wagner's activity at this point to determine if jury prejudice can sustain the ousting of Wagner and the threats of a similar fate for Meldon.

Wagner's conduct beginning with the motion to suppress and ending with the phone call statement had required retiring the jury from the courtroom several times. Although these annoying interruptions were vexatious, it certainly cannot be said that, individually or cumulatively, they would have made an impartial verdict impossible. See *Somerville*, *supra*. Furthermore, we recognize that Wagner was guilty of improper conduct when, despite the court's ruling, he "labeled" the proceeding as the case of the incredible witness. However, this transgression had been corrected before the jury and was past when Wagner's comment about a post-arrest phone call to Dinitz was stopped in mid-sentence by an objection. This record contains no intimation that the trial judge thought the jury had been prejudiced by Wagner's mistakes of conduct up to the time they were excused upon the government's objection to the phone call statement. Even at that point the court's only expressed concern was to determine whether the *anticipated* comment was one that could be supported by admissible evidence. Even if we were to assume that counsel's actions were intended to affect the jury, the facts in the record at this time will not permit justifying the mistrial because of jury preju-

dice for this jury never heard the matter which the judge termed "character assassination." [10] If the court below considered that the jury in the first case had been prejudiced by Wagner's conduct up to this point, such prejudice could have been cured by a cautionary instruction. This being so, the existence of such curable prejudice would not support a mistrial. *See* Carsey v. United States, 129 U.S.App. D.C. 205, 392 F.2d 810 (1967).

In United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), the court based its holding that the mistrial was not supported by manifest necessity on the trial judge's failure to consider other alternatives. *See also* United States v. Cheung, *supra*. In the instant case, the court had not ruled on the matter of the admissibility or permissibility of the extortion attempt line of defense. Except for his single lapse in the "incredible witness" comment, Wagner had not demonstrated an unwillingness to comply with the court's rulings. Thus an obvious alternative to disbarring Wagner and precipitating a mistrial would have been a ruling prohibiting reference to the extortion attempt and a warning to Wagner against future interjection of this matter without first establishing a valid basis in proof. In United States v. Whitlow, 110 F.Supp. 871 (D.C.

[10] In making this determination we have not failed to give full consideration to the trial judge's superior opportunity to observe the effect of particular statements on the jury. *See, e.g.*, Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961).

D.C. 1953) the court held that the defendant's rights against double jeopardy would be violated by retrial, after a mistrial, because the defendant's attorney had exceeded the bounds set by the court in examining witnesses. In *Whitlow* the court stated that grant of a mistrial for misconduct of defense counsel would not be proper except in case of misconduct going to the very vitals of the trial itself. "Minor misconduct of defense counsel, such as overstepping the limits set by the court for the examination of the witness, does not under the authority warrant a mistrial, thereby depriving the defendant of his right to secure a verdict from the jury that has been sworn to try him." 110 F.Supp. at 876.

Assuming for the sake of argument Wagner was engaged in a deliberate, contemptuous course of baiting the court and improperly attempting to assassinate the character of the principal prosecution witness, still no manifest necessity for his immediate dispatch would have existed.[11] Such misconduct could never be condoned, but insofar as the trial then in progress was concerned, other alternatives

[11] It is not at all clear that the discord between the court and Wagner was not the result of a basic misunderstanding. The court was only concerned with the existence of proof that the undercover agent Cox was the same man who had picked up the bundle left for the extortionist. If the court ever considered that Wagner may have been urging a broader contention—that Dinitz had been set up for the criminal contact with Cox in order to enable someone, not necessarily Cox or a confederate, to extort funds from him—it is not apparent from the transcript.

available to the trial judge had to be considered. *See* United States v. Jorn, *supra*. For example, the judge could have warned Wagner that he would be cited for contempt if such practices continued. He could have actually cited him for contempt and imposed post trial sanctions for each citation if he thought Wagner's conduct amounted to obstructing the performance of his judicial duty. *See* 18 U.S.C. § 401; and In re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962). The trial judge could have caused a complaint to be filed with the grievance committee of the state bar or taken post trial steps to prevent him from being admitted to practice before the Northern District of Florida. In view of these and any other alternatives which would not affect the ability to continue the trial, we cannot say that there was manifest necessity for the trial judge's actions.

We have carefully read and reread the record and, although Wagner's conduct was far from exemplary and may have justified disciplinary action, we cannot conclude that taken separately or together his mistakes vested the court with discretion to deprive his client of representation in this criminal case. For emphasis, we reiterate our refusal to rule that there are no circumstances in which such a midstream disbarment would be proper. Similarly, we caveat that we do not intend to fashion any rule which would permit obstructionary conduct by defense counsel, any attempt to create a mistrial, or the adoption of a trial strategy of creating jury prejudice. Evidence

of such reprehensible practices would present a different case. We hold only that Wagner's actions did not rise to the malevolent level of creating incurable jury prejudice or requiring the banishment of counsel from the courtroom to preserve the orderly processes of justice. Adequate alternatives were available to deal with the errors which did not require sacrificing of the defendant's ability to continue his defense.

Reversed.

BELL, Circuit Judge (dissenting):

I respectfully dissent. Two basic precepts in a system of criminal justice are (1) that it be a workable institution and, (2) that it be administered in an even handed manner. The majority opinion violates both precepts. It distorts the application of the Double Jeopardy Clause of the Constitution to the extent of burdening the system, and the only result of the distortion is a windfall to defendant Dinitz.

The distortion arises out of misconception on the part of the majority as to how the Double Jeopardy Clause is to be administered. In United States v. Jorn, 1971, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed2d 543, the court was concerned with a case where the double jeopardy bar was claimed because of the grant of a mistrial by the trial court on its own motion. The test applied was that of whether the trial court abused its discretion. The majority applies the same test here, apparently giving no consideration to the different rule that obtains when the defendant

seeks the mistrial. The *Jorn* decision points up the difference in its discussion of the policy underlying the application of the Double Jeopardy Clause. The right involved is that of a defendant to have his trial completed by a particular tribunal. In adverting to circumstances when reprosecution is allowed or not allowed, the court draws the distinction between those instances when the defendant gives up his option to have the cause determined by the first jury such as by motion for mistrial, a new trial, or by appeal, and those instances where the court deprives the defendant of such option. The court said:

> "If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial over-reaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." 400 U.S. at 485, 91 S.Ct. at 557.

The court explicated the prosecutorial or judicial overreaching situation by commenting that in such cases reprosecution might well be barred despite the defendant having made a motion for mistrial. 400 U.S. 485, n. 12, 91 S.Ct. 547. *Jorn* goes on to point out that in the absence of a motion for mistrial by the defendant, manifest necessity for the mistrial must appear. It was under the manifest necessity doctrine that the court applied the abuse of discretion test.

Here we have a motion by defendant for a mistrial and the error of the majority is seen in the avoidance of determining whether there was judicial overreaching on the part of the district court as distinguished from judicial error (equated by the majority opinion with an abuse of discretion).[1] Under the teaching of *Jorn*, this issue cannot be avoided. The majority is correct in applying the double jeopardy bar if there was in fact judicial overreaching. The majority is in error if the conduct of the district court fell short of judicial overreaching.

This posture of the case for decision is demanded by our own decisions following *Jorn*. *See* United States v. Romano, 5 Cir., 1973, 482 F.2d 1183, 1187-1188; United States v. Beasley, 5 Cir., 1973, 479 F.2d 1124, 1125-1126; United States v. Iacovetti, 5 Cir., 1972, 466 F.2d 1147, 1151-1152. In each of these cases the bar of double jeopardy was denied the defendant because of having sought the mistrial. Indeed, we recognized the premise in McNeal v. Hollowell, 5 Cir., 1973, 481 F.2d 1145, 1150-1151, that a defendant who engages in a course of conduct calculated to necessitate the granting of a mistrial, although not actually requesting a mistrial, may be barred from relying on a double jeopardy defense.

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[1] Given the view of the majority that further prosecution is barred, I do not reach defendant's other assignments of error including whether the district court was in error at all in removing defendant's co-counsel from the case.

The question for consideration then is whether the record makes out a case of judicial overreaching. The defendant was a third year law student who was charged with selling LSD. He was represented by retained counsel, Mr. Meldon, from the time of his arrest to trial, a period of a little over two months, and the representation was vigorous from the standpoint of efforts to discover and suppress. On the day of the trial Mr. Meldon was joined in the defense by Mr. Baldwin, the law professor who handled this matter on appeal, and by Mr. Wagner, a Florida lawyer who resided in another district and who was not admitted to practice in the Northern District of Florida. Mr. Wagner stated to the court that he would handle the facts and that Mr. Baldwin would handle law questions and that the three appeared as co-counsel. The issue to be tried was a simple one: whether the jury would believe an undercover government agent who claimed that he purchased the LSD from the defendant. The defense was to discredit the informer by showing an effort by someone to extort money from the defendant after his arrest, presumably for dropping the prosecution.

While recognizing the possibility and even probability in some cases of different inferences being drawn by different readers of records, I draw the distinct conclusion from the record that Mr. Wagner conducted himself in an improper manner from almost the moment of his entry into the case. The trouble started in a preliminary hearing on a motion to suppress. There was impropriety on Wagner's part

in the opening statement in the form of arguing, rather than stating the case and, with regard to the baseless charge of extortion against the government witnesses. The district court gained the impression that Mr. Wagner was baiting the court and I find ample support for that impression. At any rate, after Wagner was removed from the case and after the discussion between his remaining two lawyers and an overnight delay, one of his lawyers made the following representation to the court:

> "Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest."

Absent such a motion the district court could have gone forward with the trial. It may be, as is said in the majority opinion, that the case would have been reversed because of error in removing Mr. Wagner but there would have been no double jeopardy bar. It would have been the defendant who sought the reversal based on the removal of Mr. Wagner. *Jorn, supra*, 400 U.S. at 484, 91 S.Ct. 547, 27 L.Ed.2d 556.

It may be, of course, as the majority points out that other methods of control short of removal were available to the court. It may be that another judge would have utilized other methods but the question is whether the method utilized in this instance reached

the proportions of judicial overreaching. My answer is in the negative.

The sum of the majority opinion is to apply to this case the abuse of discretion test of *Jorn* where a mistrial was granted by the court sua sponte. This is simply an incorrect approach and confuses two separate tests. Here the defendant sought the mistrial and there is no factual basis for a finding of judicial overreaching as distinguished from error amounting to an abuse of discretion. The majority does not contend otherwise but simply fashions a new doctrine of double jeopardy: the bar is applicable on the basis of error amounting to an abuse of discretion on the part of the trial court despite appellant seeking the mistrial.[2] This is contrary to *Jorn*.

There are two unfortunate aspects to the majority opinion. First, the *ratio decidendi* is too extreme to be workable and will give rise to much reluctance in granting mistrials. The trial courts will understand that society will be better served by completing a trial, even after clear error has arisen and the defendant seeks the mistrial, than the alternative of a mistrial and the possible bar of double jeopardy based on the error. The time and expense involved in completing the trial, taking an appeal, and in the retrial will often be a small price to pay to protect the societal interest in law enforcement.

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[2] A strong argument could be made for the proposition that Mr. Wagner pursued a course of conduct calculated to cause a mistrial. *Cf.* McNeal v. Hollowell, *supra*.

Dinitz goes free but there should be little likelihood of a district court falling into a trap of the kind set here, whether set purposely or by happenstance, now that the law elucidated in the majority opinion has surfaced. Hopefully, the majority decision will thus spend itself.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2109

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NATHAN GEORGE DINITZ, DEFENDANT-APPELLANT

Nov. 27, 1974

Appeal from the United States District Court for the Northern District of Florida.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

PER CURIAM:

[1] The court, en banc, affirms the panel opinion holding that a defendant's motion for mistrial does not remove the bar to reprosecution when the formal mistrial motion by defendant is solely caused by an abuse of judicial discretion, which though not intended to avoid an acquittal, is so damaging to the defendant that he cannot proceed with his case and submit it to the jury then empaneled.[1] The judge's

[1] 492 F.2d 53 (5th Cir. 1974).

action, taken without defendant's provocation or consent, had the effect of depriving him of effective assistance of counsel thereby making further conduct of the trial impossible.

[2] In order for a defendant's motion for a mistrial to constitute a bar to a later plea of double jeopardy, some choice to proceed or start over must remain with the defendant at the time his motion is made. The dicta from United States v. Jorn, which is the foundation of the dissent,[2] does not encompass the extraordinary circumstances of the present case, in which judicial error alone, rather than defendant's exercise of any option to stop or go forward, took away his "valued right to have his trial completed by a particular tribunal."

GEWIN, BELL, THORNBERRY, COLEMAN, AINSWORTH, RONEY and GEE, Circuit Judges (dissenting):

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[2] "If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarly assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."

400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543, 556 (1971).

We respectfuily dissent for the reasons stated in the dissent filed to the panel opinion. United States v. Dinitz, 5 Cir., 1974, 492 F.2d 53, 61 (dissenting opinion).

We also note that the panel opinion in United States v. Walden, 4 Cir. 1971, 448 F.2d 925, relied upon in the original majority opinion in this case, was superseded on rehearing en banc. United States v. Walden, 4 Cir. 1972, 458 F.2d 36 (affirming district court on double jeopardy question by an equally divided court).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 73-2109

D. C. Docket No. GCR 1365

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

NATHAN GEORGE DINITZ, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Florida

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion entered by a panel of this Court on April 4, 1974, reversing the judgment of the said District Court in this cause be, and the same is hereby affirmed by the Court en banc.

November 27, 1974

GEWIN, BELL, THORNBERRY, COLEMAN, AINSWORTH, RONEY and GEE, Circuit Judges, dissenting.

Issued as Mandate: Dec. 9, 1974

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Gainesville Criminal No. 1365

THE UNITED STATES OF AMERICA

v.

NATHAN GEORGE DINITZ

ORDER

A mistrial having been declared in this action on February 16, 1973, this cause is now before the Court upon motion of the defendant Dinitz to dismiss the indictment in which he is charged. The defendant seeks to dismiss the indictment on the ground that to try him again would constitute double jeopardy. Also before the Court is a motion of the defendant for reinstatement of defendant's attorney Maurice Wagner. Having fully considered the memorandum of law offered in support of defendant's Fifth Amendment claim and being otherwise advised in the premises the Court is of the view that the Fifth Amendment would not be violated by a trial of this defendant and therefore the motion to dismiss the indictment should be denied. Defendant's motion for reinstatement is likewise denied.

I

The defendant Dinitz was brought to trial in the above styled cause in Gainesville, Florida, on February 15, 1973, a jury having been selected and sworn the previous morning. During the course of opening statements to the jury counsel for the defendant Maurice Wagner made improper comments to the jury necessitating removal of the jury on at least four occasions. On each occasion the Court admonished counsel, instructing him to confine himself to proper opening remarks. Nevertheless, counsel responded to the Court's instructions with argumentative and 'baiting' riposte.

Continuing in the guise of 'opening remarks' to the jury counsel thereafter sought to accuse the government agent of an extortion attempt against the defendant, counsel then knowing that he had not a whit of evidence of any such involvement by the agent. Because of such conduct which the Court considers highly prejudicial and inflammatory this Court had the United States Marshals remove the attorney Maurice Wagner from the courtroom and barred him from proceeding further in the defense of defendant Dinitz.

The attorney Maurice Wagner was not the attorney of record for the defendant and had been recognized to appear on behalf of the defendant only as a courtesy of the Court.

II

On February 16, 1973, counsel of record for the defendant Dinitz, Jeffrey Meldon, appeared in the proceedings held in Chambers of this Court and represented to the Court that he had conferred with the defendant and it was in their judgment in the best interest of the defendant to move for a mistrial in Gainesville Criminal No. 1365. The Court granted the motion for mistrial for the following reasons:

> a) The demeanor of counsel Wagner and the impression he conveyed to the jury made it impossible for the government to get a fair trial: Counsel Wagner stated to the jury that the arrest of the defendant was but an "afterthought" by the government when counsel knew that the defendant had been indicted for a substantial period of time prior to the arrest. Then characterizing his next line of remarks as "the unusual circumstances" surrounding the prosecution of defendant, counsel Wagner placed before the jury information regarding certain telephone calls which the defendant had received, Wagner then intending to tell the jury of an extortion attempt against defendant which he [Wagner] was prepared to argue to the jury involved the government agent;
>
> b) Counsel of record Meldon indicated that he was unprepared to continue and some considerable time would be required for his preparation for trial;

c) The Court felt that the defendant quite possibly could be prejudiced by the absence of the attorney who had initially addressed the jury on behalf of the defendant; and

d) It appeared to the Court that defendant no longer wished to be represented by the counsel of record Meldon, said counsel having asked the Court for leave to withdraw as counsel.

CONCLUSIONS OF LAW

It is settled law today that " 'The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. *Wade* v. *Hunter*, 336 U.S. 684, 688.' " *Gori* v. *United States*, 367 U.S. 364, 367 (1961). The Supreme Court of the United States has stated that:

> ". . . Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection and he may be retried consistently with the Fifth Amendment. . . . *Simmons* v. *United States*, 142 U.S. 148;" *Gori*, supra, p. 368.

In *Gori* the presiding judge, on his own motion made with neither approval nor objection by petitioner in that action, withdrew a juror and declared a mis-

trial. The Supreme Court affirmed the conviction arising out of petitioner's second trial noting its unwillingness, where it appears that a mistrial had been granted in the sole interest of a defendant, to hold that the necessary consequence of a mistrial is to bar all retrial. The Court explained that it was reluctant to make the federal trial courts "unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." *Gori*, supra, p. 370.

Certainly this Court has done no less for the defendant Dinitz in the case at bar. Dinitz was essentially without counsel before a jury which possibly had been prejudiced by the inappropriate conduct and the resultant absence of defendant's chief trial counsel. Thus, the Court was confronted with requiring the defendant to proceed to trial with unprepared counsel with whom defendant had irreconcilable differences. In the context of this particular trial the declaration of a mistrial was dictated by "manifest necessity." See *Illinois* v. *Somerville*, —— U.S. —— (1973) [41 U.S.L.W. 4319, February 27, 1973]. The "manifest necessity" standard upon which the holding in *Illinois* v. *Somerville*, supra, is bottomed was first articulated by the Supreme Court in *United States* v. *Perez*, 9 Wheat 579 (1824), the fountainhead decision construing the double jeopardy provision relative to declaration of a mistrial. In *Perez* the Court commented:

"We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious cases; and, in capital cases especially. Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." Id., at 580.

This the Court has done in this cause. Accordingly, it is

ORDERED:

[1] That the motion of defendant Dinitz to dismiss the indictment be and the same is hereby denied; and

[2] That the motion of defendant Dinitz for reinstatement be and the same is hereby denied.

DONE and ORDERED this 26th day of March, 1973.

/s/ David L. Middlebrooks
DAVID L. MIDDLEBROOKS
United States District Judge

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